Nos. 15276-77

United States Court of Appeals

For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY,
Appellants,
vs.
ALOUETTE PEAT PRODUCTS, LTD., *et al., Appellees.*

INTERSTATE COMMERCE COMMISSION, *Appellant,*
vs.
ALOUETTE PEAT PRODUCTS, LTD., *et al., Appellees.*

PETITION FOR REHEARING

Before: Hon. William Healy, Hon. James Alger Fee, Circuit Judges, and Hon. W. D. Murray, District Judge.

B. E. LUTTERMAN
HAROLD G. BOGGS
ROBERT F. GARING
R. PAUL TJOSSEM
Attorneys for Railroad Appellants.

404 Union Street,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

FILED
JAN 22 1958

Nos. 15276-77

United States Court of Appeals

For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY,
Appellants,
vs.
ALOUETTE PEAT PRODUCTS, LTD., *et al., Appellees.*

INTERSTATE COMMERCE COMMISSION, *Appellant,*
vs.
ALOUETTE PEAT PRODUCTS, LTD., *et al., Appellees.*

PETITION FOR REHEARING

Before: Hon. William Healy, Hon. James Alger Fee, Circuit Judges, and Hon. W. D. Murray, District Judge.

B. E. LUTTERMAN
HAROLD G. BOGGS
ROBERT F. GARING
R. PAUL TJOSSEM
Attorneys for Railroad Appellants.

404 Union Street,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

STATUTES

United States Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY, *Appellants,* vs. ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*	Nos. 15276-77
INTERSTATE COMMERCE COMMISSION, *Appellant,* vs. ALOUETTE PEAT PRODUCTS, LTD., *et al.*, *Appellees.*	

PETITION FOR REHEARING

Before: Hon. William Healy, Hon. James Alger Fee, Circuit Judges, and Hon. W. D. Murray, District Judge.

COME NOW the railroad appellants, and petition the Court for rehearing in this cause; and in support thereof state as follows:

SPECIFICATIONS OF ERROR

We respectfully submit that the Court in its opinion filed in this cause on December 26, 1957, erred in the following particulars:

1. In concluding on page 13 that the shippers have

paid cash that should not be required of them, and the Commission is required to order its recovery.

2. In concluding on pages 9, 10, 11 and 12 that the rates here considered are unlawful rates, and that the Commission on complaint is *required* to find that they never became effective.

3. In concluding on page 13 that the Commission's determination that the carriers failed to comply with the order of the Commission in *Ex Parte 162* is final and conclusive, and is not reviewable by this Court.

4. In affirming the judgment.

We will argue these errors in the order hereinabove stated.

ARGUMENT

Specification of Error No. 1

The Court erred in concluding on page 13 that the shippers have paid cash that should not be required of them, and the Commission is required to order its recovery.

In footnote No. 4 on page 7, the Court said:

> "The Commission having in *Ex Parte 162* determined that the maximum increase that should be allowed in peat freight rates was 6 cents per hundred pounds or $1.20 per ton, a serious question exists as to the Commission's authority to find in its October 30, 1954, order that the rates were not shown to be unjust or unreasonable, in the light of the decision of the Supreme Court in Arizona Grocery v. Atchison R. Co., 284 U.S. 370, despite the Commission's attempt in *Ex Parte 162* (266 I.C.C. 537 at 617) to remove that order from the doctrine of the Arizona Grocery case. How-

ever, the District Court did not consider that question, nor do we."

Here the Court disclaims any intention of passing on the question which it raised. Yet on pages 12 and 13 the Court raises and decides this very question. There the Court said:

> "If the theory of the Commission in this case were to be upheld, a strange situation indeed would exist. Here in *Ex Parte 162,* the Commission found as a matter of fact that the carriers were entitled to a maximum of 6 cents per hundred pounds increase in peat freight rates. Thereafter, for the period between January 1, 1947, and March 29, 1948, the carriers exacted a greater increase than the Commission had found they were entitled to, and the railroads themselves apparently recognized this fact when they voluntarily reduced their rates to reflect the maximum increase of 6 cents. Thereafter, upon further proceedings before the Commission, the Commission reaffirmed its finding that the 6 cents increase was the maximum that should be allowed. Thus under the findings of the Commission, made at two different times, it is established that the 6 cents maximum increase in peat freight rates is all the carriers are entitled to charge; and it is equally established that during the period from January 1, 1947, to March 29, 1948, thousands of dollars were collected from shippers in excess of what would have been collected under the rate the Commission twice determined should be allowed. In short, the shippers here, as in Southern Pacific v. Darnell-Taenzer Co., *supra,* 'have paid cash out of pocket that should not have been required of them,' *and it would be unthinkable if, as the Commission held, they could not recover it.*" (Emphasis supplied)

We note parenthetically that we did not, as the Court infers, reduce these rates because we recognized we had increased them beyond that which the Commission had permitted. We reduced these rates in the normal process of rate-making, and not because we believed these rates were in violation of any order of the Commission (R. 199, 260, 267).[1]

Returning to the point in issue, it is apparent from the Court's language on page 12 that the Court concluded that the Commission had twice decided that the maximum the carriers were entitled to charge was the peat rates increased by a maximum of 6 cents per hundred pounds. Hence the statement, "and it would be unthinkable if, as the Commission held, they could not recover it."

If it were true that the Commission had twice decided that peat rates increased by not more than 6 cents per hundred pounds were maximum reasonable rates, and the carriers nevertheless exceeded those rates, we would agree that it would be unthinkable for the Commission not to require us to refund the excess. For in that situation we would have damaged these shippers by charging unreasonable rates.

However, the fact is the Commission in *Ex Parte 162* did not determine that peat rates increased by 6 cents per hundred pounds would constitute maximum reasonable rates, nor did the Commission make such a determination in its first decision in this case.

---

[1] References to the printed Transcript of Record will be shown by the letter "R" followed by the page in the Record at which the material referred to appears.

We first will consider the Commission's order in *Ex Parte 162,* 266 I.C.C. 537.

We start with two fundamental principles:

(a) The Interstate Commerce Act has not taken from the carriers their power to initiate rates. *Skinner & Eddy Corp. v. U. S.,* 249 U.S. 557, 63 L.ed. 772.

(b) "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *U.S. v. Chicago, M. St. P. & R.R. Co.,* 294 U.S. 499 at 506, 79 L.ed. 1923.

The *Ex Parte 162* case was a proceeding in which the carriers, because of drastic and sudden increases in their costs and decline in traffic, sought emergency authority to increase their revenues. It is seen from the report that case involved all of the Class I carriers in the United States, covered the full range of commodities handled by the railroads in the entire United States, and affected many thousands of rates. It involved an increase in freight charges of about 1 billion dollars (page 544).

When the nation's railroads are faced with an emergency need for revenue, they could under the Act simply file tariffs naming the increases they feel are required. *Skinner & Eddy Corp. v. U.S.,* 249 U.S. 557. Unless suspended by the Commission, these increased rates would take effect on 30 days' notice. If this course was followed, the carriers would run the almost certain risk that their publication would be suspended by the Commission under its suspension power granted by Section 15(7) of the Act, Title 49 U.S.C.A. Sec.

15(7). This suspension could last for a period of 7 months, during which time some of the carriers could become bankrupt.

As a practical answer to these emergency situations, there has evolved proceedings which have become known as *Ex Parte* increase cases, of which *Ex Parte 162* is representative. For similar cases see *Ex Parte 115, General Commodity Rate Increases, 1937,* 208 I.C.C. 4, 215 I.C.C. 439, 223 I.C.C. 657; *Ex Parte 148, Increased Rates, 1942,* 248 I.C.C. 545; *Ex Parte 166, Increased Freight Rates, 1947,* 270 I.C.C. 93, 270 I.C.C. 403. The carriers, when faced with an emergency need for revenue, petition the Commission to modify outstanding rate orders so they may increase their rates in stated amounts by publishing and filing tariffs on less than statutory notice. This petition is set down for hearing, and with as much dispatch as is possible considering the number of parties involved, the magnitude of the subject matter, and the territorial scope of the proceedings, the Commission enters an order specifying what per cent of increase will be allowed and what exceptions, if any, should be made in the general percentage increase.

This is what was done in *Ex Parte 162,* and all that was done. The Commission makes no determination that any individual rate when increased by the permitted amount is reasonable. *So far as rate levels are concerned, all the Commission has determined is that if rates are increased to the extent authorized, they will not suspend under Section 15(7).* The only general finding it made on the reasonableness of the increased rates appears in finding 2 on page 614 as follows:

> "Except as otherwise specifically provided in these findings or in the appendix thereto, all basic freight rates and charges of the petitioning rail and water carriers justly and reasonably may be increased for the future by 20 per cent."

This does not constitute a finding that any rate in excess of this amount is unreasonable.

The increased rates are initiated by the carriers, they are not prescribed rates within the meaning of *Arizona Grocery v. Atchison R. Co.,* 284 U.S. 370. Nor did the Commission determine that any individual rate or set of rates were unreasonably low or unreasonably high.

The nature of the *Ex Parte 162* proceedings is made clear by the Commission's quote from an opinion by the late Commissioner Eastman appearing on pages 613 and 614 of the report, where they quote him as saying in an earlier *ex parte* increase case:

> "The present proceeding has nothing of finality about it and in many respects is similar to a suspension case, where the question is whether or not certain proposed rates shall be permitted to take effect without suspension, a matter left by the act to the discretion of the Commission."

Therefore, the Commission in an *ex parte* increase case is not adjudicating the maximum reasonableness of any individual rate or set of rates. The Commission is merely determining that rates filed pursuant to their order are *prima facie* reasonable, and the Commission will not suspend the publication pending investigation as to the reasonableness of the rates.

The rule, of course, works both ways. Carriers can-

not defend against claims for reparation on the grounds that rates filed pursuant to an *ex parte* increase order have been adjudicated as reasonable rates. The Commission's finding that rates may generally be increased by a given percentage does not constitute an adjudication that the resulting rates are reasonable maximum rates or are otherwise lawful.

The Commission has consistently held that the fact they authorized a rate to be increased in a general increase case is no defense when upon investigation it appears the rate is in fact unreasonable. For example, see *William Kelly Milling Co. v. Atchison, T. & S.F. Ry. Co.,* 211 I.C.C. 53 at 56; and *Marshall Field & Co. v. Chesapeake & O. Ry. Co.,* 241 I.C.C. 789 at 792.

All the Commission determined in *Ex Parte 162* was that if the carriers increased their rates on fertilizers by a maximum of 6 cents per hundred, such publication generally would not result in unreasonable rates. They made no finding, and did not purport to make any finding that individual rates or a set of rates on peat or any other commodity, if increased by any amount in excess of the authority there granted, would result in unreasonable rates.

The Commission therefore in *Ex Parte 162* did not find that these peat rates were unreasonable rates.

Nor did the Commission make this finding in their first order in this case. On the question of the reasonableness of the rates we charged, they said (R. 328):

> "The evidence introduced by defendants in an attempt to establish the reasonableness of the assailed rates as increased misses the crux of the issue here presented."

In that decision the Commission sought to deprive us of the revenue we had received in excess of 6 cents per hundred pounds increase as punitive damages, based on their finding that we had violated their order. This they cannot do. *Pennsylvania R. Co. v. International Coal Min. Co.,* 230 U.S. 183, 57 L.ed. 1447. In that decision the Commission did not find that we charged unreasonable rates. Instead they based their decision on the theory that the carriers were unjustly enriched (R. 329, 330).

We demonstrated to the Commission that irrespective of the manner in which these rates came into being, the rates fall within the zone of reasonableness. The only adjudication there has been of the reasonableness of these rates is the Commission's last decision in this case (R. 381-386). In that decision, and in only that decision, did they consider the question of reasonableness and the evidence bearing on the reasonableness of the rates. In so doing they found the rates reasonable. The shippers therefore paid nothing more than reasonable rates for the transportation they received.

Certainly there is nothing wrong with carriers receiving a reasonable charge for the service they have rendered. If the carriers here retain all of these charges, they still will have received nothing more than reasonable charges for their service rendered to these shippers.

Specification of Error No. 2

The Court erred in concluding on pages 9, 10, 11 and 12 that the rates here considered are unlawful rates, and that the Commission on

complaint is required to find that they never became effective.

It would appear from the Court's statement on page 3,

> "The appellant carriers, subsequent to *Ex Parte 162,* filed with the I.C.C. a special commodity rate on peat shipped from points in British Columbia to destinations in the United States, effective January 1, 1947. . . ."

that the Court may have a misunderstanding of what happened following the decision in *Ex Parte 162.* Peat, generally in the United States, is included in the list of commodities that take rates published for application on fertilizer. Long before 1947—in 1936, 1937 and 1940 on transcontinental traffic (R. 257, 258), and 1937, 1939 and 1940 on California traffic (R. 276, 277), the carriers voluntarily reduced the rates on the peat here considered by removing this commodity from the list of fertilizers and making special lower point-to-point commodity rates applying on peat. We have already pointed out that in so doing, the carriers made rates that were extremely low and which fell near the margin of reasonable minimum rates. In fact, we have shown in our opening brief (pages 23 and 24) that if the carriers had not voluntarily taken this action in the late thirties and early forties and had left peat in the fertilizer group and increased the fertilizer rates by only 6 cents per hundred, these shippers after January 1, 1947, would have paid higher charges than they have been required to pay.

Therefore, when the carriers petitioned the Commission for advance approval of filing tariffs naming per-

centage increases in rates to obtain needed additional revenue in 1946, our tariffs contained these special low commodity rates on peat.

In publishing the increases authorized by the *Ex Parte 162* order, the carriers under special permission published one supplement that carried all of the increases into effect. This was accomplished by providing that all of the rates as then stated in the tariffs for application in Western Territory would be increased by 20 per cent (Ex. 4, R. 407-411), subject to only such exceptions as were noted in the tariff.

The exception on fertilizers is found in Item 107 in the reproduction of the tariff at page 410 of the record. This exception applied 6 cents per hundred maximum on fertilizers, "as and when taking fertilizer rates." This publication limited the increase to 6 cents per hundred pounds on all of our *fertilizer* rates and since peat was not then included in the list of commodities taking such rates, the tariff specified a 20 per cent increase on the lower point-to-point commodity rates on peat.

With this background, we now turn to the legal question: Is the Commission *required* to declare that reasonable, non-discriminatory, non-prejudicial rates are nevertheless unlawful and therefore inapplicable, even though filed with and accepted by the Commission, when it is shown they came into being on less than 30 days' notice and without prior Commission authority for filing on less than 30 days' notice?

This question is not new. It has been before the Com-

mission many times. (See cases cited by the Court on page 8 of the opinion.)

In *Wisconsin Mfrs.' Assn. v. Ahnapee & W. Ry. Co.,* 272 I.C.C. 497 at 500, another case growing out of the carriers' interpretation and application of the order of the Commission in *Ex Parte 162,* the Commission said this:

> "One of the duties of defendants is to initiate rates. In publishing rates under permissive or mandatory orders of the Commission, it frequently occurs that the carriers propose other changes in rates not specifically authorized or required by the findings in the particular proceedings. Such rates are subject to protest and suspension if they are considered to be unlawful."

The contention that rates filed with the Commission should be declared inapplicable, because the tariffs contravene some section of the Act, has been raised many times, and uniformly and consistently these contentions have been denied by both the courts and the Commission.

This contention was raised and denied in *Davis v. Portland Seed Co.,* 264 U.S. 403, 68 L.ed. 762.

Under Section 4(1) of the Act, carriers are prohibited from publishing and filing tariffs which name a lesser rate to a more distant point on the same route as is named for a less distant point, except on application to the Commission and authorization by the Commission. In *Davis v. Portland Seed Co., supra,* at page 415, the Supreme Court said:

> "Relying on Pennsylvania R. R. Co. v. International Coal Co., 230 U.S. 184, the Interstate

> Commerce Commission has definitely rejected respondent's theory by many opinions, and holds that while a charge prohibited by the long and short haul clause, §4, may subject the carrier to prosecution by the Government it does not afford adequate basis for reparation where there is no other proof of pecuniary damage. . . . "

What the Supreme Court in that case also said is equally applicable to the situation here:

> "With special knowledge of rate schedules, and relying on Pennsylvania R. R. Co. v. International Coal Co. (230 U.S. 184) the Interstate Commerce Commission for ten years has required proof of financial loss as a prerequisite to reparation for infractions of the 4th section. The rule is firmly established. Congress has not shown disapproval."

The Commission, with special knowledge of rate schedules, has held for many years that proof of financial loss is a prerequisite to reparations for infractions of the 6th Section (See cases cited at pages 20-21 of our opening brief). This rule, too, is firmly established, and Congress has not shown disapproval.

Nor does the Supreme Court's decision in *Davis v. Portland Seed Co., supra,* sustain a different conclusion. In commenting on that case in the footnote (5) on page 9, the Court quotes the following language from that decision: " 'The statute requires rigid observance of the tariff, without regard to the inherent lawfulness of the rates specified,' " and comments that "leaving the inference that if it is inherently unlawful for any reason, it will be corrected upon application to the Commission."

It should be remembered that the Court made this

statement in a case dealing with a tariff that was unlawfully filed, as it violated Section 4. Yet the Supreme Court sustained the tariff. What the Supreme Court was saying was that the tariff must be applied, and the shippers' remedy is limited to an award of damages if pecuniary damage is shown by the application of rates named in the applicable tariff. Saying it another way: the Supreme Court in that case held that unless the *rate* was unlawful shippers could not claim damage simply because the carriers violated the Act when the rate was established. There, as here, the violation, if any, was the carriers' act in filing the tariff, and damages will not be awarded unless the *rates* are inherently unlawful.

The Court's present opinion will destroy the main purpose for the enactment of Section 6. Section 6 was included in the Act to prevent discrimination in the application of rates to transportation. Section 6 prevents discrimination only by its requirement that the only rates that can be applied to transportation are the rates on file with the Commission. In the furtherance of this congressional policy, and in the interest of absolute certainty as to what rates apply to transportation at any given period, the Commission has consistently followed the rule that there is but one test by which to determine the question of what rates are applicable: If the rates are in tariffs which the Commission has accepted and filed they are applicable.

If the Court is correct in its opinion this will no longer be the case. Under the Court's opinion, rates which are thought to be applicable because they have

been filed with the Commission may be declared inapplicable in a complaint case. Under the rule announced by the Court, unless shippers examine the procedure followed by the carriers in establishing rates they will never know whether the rates on file with the Commission are not subject to being declared inapplicable.

The consequence of the Court's ruling that rates must be declared inapplicable if on complaint it appears they were filed in contravention of Section 6 is no different than if the Court had ruled that rates filed in contravention of Section 6 never became applicable. In either case the result is the same: the rates were never applicable.

The rule adopted by the Commission is authorized by Section 6. The requirement that rates named in tariffs cannot be changed except on 30 days' notice is directed to the carriers and not the Commission. The Commission, in the same section that requires 30 days' notice, Section 6(3), was given the following discretion:

> " . . . the Commission may in its discretion and for good cause shown, allow charges upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances."

Under this provision the Commission may disregard the 30 days' notice provision and accept tariffs that give less notice. Certainly the language of this provision is broad enough to empower the Commission in its discretion to adopt the rule that where it accepts tariffs and files them, the rates therein named are applicable and

the charges assessed under such rates are subject to challenge only as being unlawful under Sections 1, 2 and 3 of the Act.

The Commission's interpretation of its power under Section 6 is also consistent with that section when considered as a whole.

The discretionary power of the Commission under Section 6(3) should be considered in light of the provisions of Sections 6(6)[2] and 6(9). In both sections the Commission is authorized to reject and refuse to file any schedule (tariff) that is tendered not in accordance with Section 6, and then provides that it is only when such tariff is rejected that it shall be void and its use shall be unlawful.

Moreover, Section 6(9) does not *require* the Commission *to reject* a tariff that is filed which does not give *lawful* notice of its effective date. The section provides that the Commission "may" reject and refuse to file such tariff, and it is only when it is rejected that such tariff is void and its use is unlawful. Here the Commission accepted the tariff and it was filed. Had Congress intended that the Commission, as the Court now holds, is *required* to reject a tariff which does not give *lawful* notice of its effective date, it would have so stated in Section 6(9).

---

[2] The publishers of U.S.C.A. did not include the 1940 Amendment to Section 6(6). As amended in 1940 it reads as follows:

"The schedules required by this section to be filed shall be published, filed, and posted in such form and manner as the Commission by regulation shall prescribe; and the Commission is authorized to reject any schedule filed with it which is not in accordance with this section and with such regulations. Any schedule so rejected by the Commission shall be void and its use shall be unlawful." Act of September 18, 1940, Chap. 722, § 8, 54 Stat. 910.

Therefore, Congress in Section 6 not only gave the Commission broad power to determine under what circumstances tariffs should become applicable, but Congress itself in Sections 6(6) and 6(9) has laid down the same rule that has been followed by the Commission.

We submit that the Supreme Court's decision in *Boston & Maine Railroad v. Piper,* 246 U.S. 439, is not in point. That case simply holds that carriers may not limit their common law liability by so providing in their tariffs filed with the Commission. It does not consider the question here presented. As we have pointed out, the question here considered was decided by the Supreme Court in *Davis v. Portland Seed Co., supra,* and although the *Davis* case was decided after *Boston & Maine Railroad v. Piper,* the Supreme Court did not find it necessary to discuss, distinguish, or overrule that decision.

Furthermore, the language of Section 6 should be contrasted to the present language of Section 20(11). As to limiting liability, Section 20(11) now provides that carriers are prohibited from limiting their liability, except in a few instances expressly mentioned, in any receipt, bill of lading, ". . . or in any tariff filed with the Commission . . . and any such limitation . . . is hereby declared to be unlawful and void."

In Section 20(11), Congress expressly provided that such tariff provisions are void. In Sections 6(6) and 6(9) Congress provided that tariffs tendered to the Commission that contravene the requirements of Section 6 would be void only when rejected by the Commission.

When Section 16(3)(g) is read in light of Section 6(6) and Section 6(9), we think it is apparent that what Congress intended by the phrase, "... lawfully on file with the Commission" in Section 16(3)(g) was rates named in tariffs accepted by and filed with the Commission. Had Congress intended that rates accepted and filed with the Commission could be declared illegal and void, and therefore unlawful rates, as used in Section 16, they would not have given the Commission discretionary authority to accept or reject tariffs in Sections 6(6) and 69), but would have provided in language similar to their language in Section 20(11) that tariffs filed in violation of Section 6 shall be unlawful and void.

The present rule of the Commission that rates that are named in the tariffs on file with the Commission are the applicable rates avoids many problems which will inevitably arise if the Court's present opinion is permitted to stand.

Under the present rule of the Commission, if any one is damaged by any rate they have a remedy under Sections 1, 2 or 3 of the Act. The public and the carriers know with absolute certainty what rates are applicable. The test of applicability is simple: the rates are either accepted or rejected by the Commission. In the first instance they are applicable; in the second they are not. The certainty in establishing one rate and one rate only for any given transportation, which was the only purpose of Congress in adopting Section 6, has been achieved. Not only do shippers know what rates they must pay; they know what rates their competition must pay.

Much of this certainty will be destroyed if the Court's present opinion is permitted to stand. We assume that if the carriers had not voluntarily reduced these rates to the basis of 6 cents per hundred, under the Court's opinion they would still be subject to attack in 1958—eleven years after they were published. Many schedules remain in effect for long periods of time. If the Court is correct that rates which do not strictly measure up to the requirements of Section 6 are susceptible to attack and on complaint they are required to be found inapplicable, the carriers may be subjected to grave unanticipated financial losses of revenue.

It will be open to any shipper to examine each publication of the carriers which was made on less than statutory notice—and there are many; and if they find a basis for contending the carriers misinterpreted the order of the Commission, or for other reasons did not strictly comply with Section 6, they may recover reparations for the full statutory period of two years. Such recoveries will be possible irrespective of whether the shippers were charged reasonable rates. For under the Court's theory the issue would be one of overcharges and not damages.

In addition, when we reduce rates on less than the 30-day notice required by Section 6, and this is constantly occurring, shippers will use these rates at their peril. Shippers using such reduced rates and relying on them to make competitive sales in markets against competition from producers in other regions, may be faced with the prospect of having their competitors

force the Commission to declare their reduced rates were inapplicable. If this occurs the carriers would have no alternative but to collect the higher charges. This will occur even though these shippers in good faith relied on rates which are named in the carriers' tariffs which were available to them, and which were filed with the Commission.

In the short time we have had to consider the Court's opinion we have not been able to foresee all of the consequences that would follow from the rule the Court adopted. In the foregoing paragraphs we have merely attempted to illustrate some of the situations that will result. We are certain, however, that under this rule there will be many instances where shippers and carriers will not know what rate is applicable until there is an adjudication by the Commission or the courts.

Nor does it follow from the Court's opinion that the judgment should be affirmed. The judgment requires reparation for the entire period from the time the increased rates took effect on January 1, 1947, until they were all finally voluntarily changed, the last reduction being on March 29, 1948.

The most that happened here was that rates were put into effect on 5 days' notice rather than 30 days' notice. The appellees have never questioned the fact that the rates were published, or filed. Their complaint is simply that the rates were published and filed on less than 30 days' notice. This short notice had only one effect on these shippers: they were required to pay the increase

in rates 25 days sooner than they would have if the full 30 days' notice had been given.[3]

Since the rates were published and filed, after the lapse of 30 days there was no longer any defect in the publication, filing, or notice. Even under the Court's theory, the most these shippers are entitled to is reparations on shipments that moved during the 25-day period between the date the rates became effective and the 30-day notice period the Court now holds was required.

Specification of Error No. 3

The Court erred in concluding on page 13 that the Commission's determination that the carriers failed to comply with the order of the Commission in *Ex Parte 162* is final and conclusive, and is not reviewable by this court.

In our foregoing discussion we have assumed that the Commission's conclusion that we failed to comply with *Ex Parte 162* order was correct and that this conclusion is binding on this Court. However, we believe we fairly interpreted the Commission's order in *Ex Parte 162,* and the Commission's conclusion on this issue is reviewable by this Court.

The question of whether the carriers complied with the order in *Ex Parte 162* is a question of law. There is and has been no dispute as to any fact. The appellees contend and we admit that in filing the increases fol-

[3] Actually the rates were published on 10 days' notice, as the tariff was issued on December 21, 1946. See Ex. 4, R. 407.

Had the rates been published on 30 days' notice the shippers could have protested the rates and asked for suspension under Section 15(7). However, since the Commission found the rates were reasonable it would appear extremely unlikely that the Commission would have suspended.

lowing the Commission's decision in *Ex Parte 162,* we increased the peat rates by 20 per cent. There is but one question involved: Under a fair interpretation of the Commission's order in *Ex Parte 162,* did the Commission authorize this action?

After the decision in *Ex Parte 162* there were many difficult questions that had to be resolved when the tariffs were prepared for publication. One of these problems was the question here presented: Did the Commission authorize a 20 per cent increase on peat when rates were published on peat, or did they intend to limit the increase to 6 cents per hundred on any commodity listed in the fertilizer group for statistical purposes?

To start with, the Commission had authorized a general increase of 20 per cent—except as set forth in the Appendix (266 I.C.C. 537, finding 2, page 614). The Commission had said very little about fertilizers in their report. What they did say appears on page 595 as follows:

> "The rail movement of fertilizer increased from about 9.5 million tons in 1940 to about 19 million tons in 1945, and the revenue from $27,000,000 in 1940 to $69,000,000 in 1945, with an average rate of about $3.60 per ton. Its average value is only about 21 per cent higher than in 1910-14, and about 13 per cent lower than in 1926. Petitioners propose a rate increase thereon of 25 per cent without limitation.
>
> "Use of fertilizer increases the fertility of the soil, and increases both the production and shipment of agricultural products in the interest of farmers, carriers, and the public generally. An in-

crease in the rates on fertilizer of 25 per cent will be too great for the longer hauls, unless a maximum is prescribed."

Peat does not increase the fertility of the soil (R. 159). Moreover, and more important, the Commission in the Appendix had stated we were generally to apply the increases in accordance with the grouping of commodities for statistical purposes (Appendix 1, page 618). We concluded that it was intended that commodities moving as fertilizer should be held to a 6-cent maximum increase, and that when commodities had been removed from this grouping for rate purposes they should take a 20 per cent increase.

The Commission in its first decision in this case did not hold that we failed to follow their general intention. They found that they intended to permit no deviations from the statistical listing of commodities as set forth in the Appendix (R. 326-327).

For the reasons set forth in our opening brief (pages 11-14) we believe it cannot be said, as a matter of law, that under a fair interpretation of the Commission's order there could be no deviation from the statistical grouping set forth in the Appendix. Had the Commission intended there could be no deviation from the statistical listing of commodities they could have made this clear by not including the last sentence in the opening paragraph of the Appendix where they said the increases were intended *generally* to apply to the commodities as listed.

We generally applied the increases to the commodities as listed in the statistical grouping. This was all

that was required of us. The increase in rates was authorized.

CONCLUSION

We earnestly request the Court to rehear this case and on rehearing to reverse the judgment of the trial court.

Respectfully submitted,

B. E. Lutterman
Harold G. Boggs
Robert F. Garing
R. Paul Tjossem
Attorneys for Railroad Appellants.

404 Union Street,
Seattle 1, Washington.

R. Paul Tjossem hereby certifies that he has prepared the foregoing petition for rehearing and that in his judgment it is well founded and is not interposed for delay.

Dated this 24th day of January, 1958.

R. Paul Tjossem
Of Counsel for Appellant Railroads.